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No. 71-288

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

*v.*

ARLO TATUM, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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ERWIN N. GRISWOLD,
*Solicitor General,*

ROBERT C. MARDIAN,
*Assistant Attorney General,*

ROBERT L. KEUCH,
GEORGE W. CALHOUN,
*Attorneys,*
*Department of Justice,*
*Washington, D. C. 20530.*

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Respondents state in their answering brief (Resp. Br. 26) that "[s]tripped of technicalities, the question before the Court is whether the Army may abridge First Amendment rights by an unconstitutional program in excess of its statutory authority while remaining immune from judicial review." Having so framed the issue, they and the *amici* treat the question of justiciability as though its resolution turns on a determination by this Court of the constitutionality of the Army's civil disturbance intelligence system.

But this Court is not called upon in this case to pass on the constitutionality of the military's civilian surveillance activity; that issue was never reached below and is not presented in the petition. Nor does the case involve a claim by petitioners that the conduct of the Army in this area is "immune from judicial review." Rather, our position is that such review is inappropriate *in this case* because the allegations in respondents' complaint of February 17, 1970, do not have the concreteness and sufficiency of focus to meet the essential requirements of justiciability, and because respondents are without standing to raise the substantive claim. In short, the very "technicalities" which respondents seek to strip away are the core of this case.

1. As developed in our main brief (pp. 18-35), the complaint is cast in the most general terms. Even the majority below recognized (App. 137) that respondents "complain of no specific action of the Army against them, only the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies." Their objection is based essentially on the claim that the mere existence of such an intelligence operation generates a chill on the exercise of First Amendment rights of persons other than respondents who wish to attend public gatherings without being observed by Army personnel.[1]

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[1] Respondents argue in their answering brief (Resp. Br. 61-66) that the Army intelligence system constitutes an

Such a claim of chill, which is not founded on any particularized government activity against these respondents or members of the class they seek to represent, fails in our view to state a justiciable case or controversy. There are no allegations here that the Army is spying on selected individuals or groups; despite the efforts of respondents and *amici* in their briefs in this Court to alter the original pleadings, no such claim is made in the complaint.[2] Instead, the

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unconstitutional invasion of privacy. But, as stated in the complaint (App. 8), this case concerns only the surveillance of "* * * peaceful political protest, demonstrations, marches, rallies, church meetings and other forms of constitutionally protected expression and assemblies * * *." The dissent below properly pointed out (App. 149-150 n. 2): "There are no allegations that the Army has conducted surveillance of wholly private activity and at oral argument [respondents] indicated, in effect, that they did not have any witnesses who would testify that the Army had engaged in such activity." Moreover, in the words of the majority below (App. 138), "[s]o far as is yet shown, the information gathered is nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand."

[2] In the *amici* brief filed by Unitarian Universalist Association, *et al.*, there is the suggestion (p. 8) that the Army surveillance activity was directed at particular individuals—*i.e.*, "numerous Congressmen and United States Senators and family members of a Senator, state and local officials, a member of this Court, newspaper reporters, clergymen, and thousands of other Americans." This is misleading. While names of some Congressmen, Senators, and others, do appear on the data bank print-outs and on the identification lists being retained for purposes of this litigation, this is due to the fact that such persons participated in *events* that were under surveillance. See, *e.g.*, I Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 387, 426. But that did not

entire focus of the pleadings is on the past practice of Army personnel (see pp. 10-14 *infra*) of attending and observing public gatherings, on military surveillance of "lawful and peaceful civilian political activity" (App. 8).[3] As Exhibit A to the complaint (App. 13-16) demonstrates, "spot reports" were prepared only on the *event* under surveillance. To the extent that respondents or others were identified in these reports, it was simply as a sponsor of, or speaker at, the public gathering in question, or as the one who, perhaps because of his refusal of induction, had been the reason for the demonstration; otherwise, general attendance at such gatherings was not recorded. Moreover, the record in this case makes clear that this surveillance activity was not directed exclusively at gatherings espousing any particular political viewpoint, such as, for example, opposition to the conflict in Vietnam. It extended to all public gatherings with a potential for civil disorder, irrespective of the underlying political purpose. As we explained in our main brief (pp. 31-33), the interest of the Army was "in the explosive possibilities and not in the

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make them the "subjects" of investigation, as *amici* seem to claim. Contrary to *amici's* statement, the Army has no dossiers or investigative files on any Congressman, Senator or member of this Court, except, of course, for files that relate solely to the military records of those who were in the service, or security clearance records on those who have sought access to classified defense information. See I Hearings 425; II Hearings 1299.

[3] The majority below pointed out (App. 137-138): "There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent."

merits of the colliding philosophies * * *'" (*Anderson* v. *Sills*, 56 N.J. 210, 222, 265 A. 2d 678, 684-685 (Sup. Ct. N.J.)).

Contrary to respondents' assertion, we do not contend at this time that the existence of such a military intelligence system could not possibly have had a chilling effect on some members of the public at large.[4] Just as certain individuals are in all likelihood deterred from attending demonstrations because of the potential for exposure from press and television coverage, so, too, some persons might conceivably have similar inhibitions due to the attendance at public gatherings of military personnel. But such a formalistic claim of chill, generated, in the words of the majority below (App. 139), simply by the "*present existence*" of government activity, is not enough alone to warrant judicial intervention. Such is the effect of this Court's decision in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90-91; and see *National Student Association* v. *Hershey*, 412 F. 2d 1103, 1114 (C.A. D.C.).

2. Respondents notably fail to discuss *United Public Workers* in their answering brief. Instead, as might be expected from the way in which they frame the issue, they refer to virtually every decision by this Court involving an application of the "chilling effect" doctrine. But respondents' parade of precedents only serves to obscure the real issue in this case; for by discussing cases that deal solely with the merits of

[4] Such an argument, if it is to be made, must be addressed to the question of the constitutionality of the Army's civilian intelligence program, which is not now before this Court; it has no place in the present case, dealing with the threshhold questions of justiciability and standing.

the constitutional claim, they have sidestepped the crucial threshhold questions of justiciability and standing. As we pointed out in our main brief (pp. 23-27), in all the First Amendment cases where this Court has heretofore reached the constitutional question of "chilling effect," it has been able to do so because the complaint was framed in terms of "concrete legal issues, presented in actual cases, not abstraction" (*United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 89). The decision last Term in *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, a case which respondents note was not cited in our main brief (Resp. Br. 42), is no different. There the issue was focussed on particular questions being asked to a defined group of people—*i.e.*, "a class of law students and law graduates similarly situated, seeking or planning to seek admission to practice law in New York" (401 U.S. at 157). The Court was asked to construe specific language that was alleged to be unconstitutionally vague and overbroad.

No such precision can be found in the instant complaint. The broad claim of chill on "millions of Americans" (App. 148) rests solely on respondents' claim, as they themselves stated below (App. 151) of "a threat of *unknown* surveillance, *unknown* purpose, and *unknown* future use of the information gathered and recorded in connection with the [Army's] civilian intelligence network" (emphasis in original). Such allegations do not present "a controversy between the parties with such immediacy and presently adversary character as to require its adjudication" (*Davis* v.

*Ichord*, 442 F. 2d 1207, 1211 (C.A. D.C.)). Indeed, as pointed out in our main brief (pp. 27-28), the "indefinite claims of highly visionary apprehensions" (App. 152) involved in this case are even less focussed than were the claims of chill which this Court declined to entertain last Term in *Younger* v. *Harris*, 401 U.S. 37, 42, and the related cases, decisions which respondents attempt to brush aside with but a single footnote reference (Resp. Br. 39 n. 44).

3. It would appear that respondents and *amici* believe it is possible to cure the deficiencies in the pleadings by reference to the extensive hearings on Federal Data Banks, Computers, and the Bill of Rights before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee.[5] It is, however, one thing to rely on legislative hearings to ascertain the intent of Congress with respect to a particular piece of legislation that has already been passed and requires judicial interpretation; it is quite another to import into a case volumes of testimony before a congressional subcommittee in an effort "to raise controversies not presented by the record." Cf. *Mutual Life Insurance Co.* v. *McGrew*, 188 U.S. 291, 312. Courts should be particularly circumspect in relying on legislative hearings in the latter instance, especially where, as here, the testimony in question was

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[5] The Hearings are published in two volumes, both of which have been filed with this Court as an appendix to the *amici* brief of Unitarian Universalist Association, *et al.* Volume I is referred to herein as "I Hearings"; Volume II is referred to as "II Hearings."

available to the plaintiffs at the time suit was commenced and they did not choose to rely on it in their pleadings.[6] Cf. *Mountain View Mining and Milling Co.* v. *McFadden*, 180 U.S. 533, 535.

a. Even if the Hearings were a part of the record in this case—which they are not—they would, in any event, be of little assistance to the respondents. To the extent that they are at all relevant they essentially corroborate the Statement in our main brief (pp. 3-13). As the testimony of then Assistant Secretary of Defense Froehlke[7] explains in some detail (I Hearings 375-467), the Army's domestic intelligence system that is under attack here essentially came into existence in 1965, "[i]n response to the increasing frequency and intensity of civil disorders" (I Hearings 379). When the disorders became widespread (see our main brief, p. 6, n. 6), military surveillance operations also expanded (*ibid.*):

> Through the period 1965-68, there was a crisis-oriented attitude with respect to civil disorders. During the entire period, and particularly in 1967 and 1968, heavy emphasis was placed by civilian and military officials at the highest levels of Government on improving the preparedness of the Federal Government structure, including

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[6] At least three former military agents who testified before the Senate subcommittee—Pyle, Peirce and Stein—were sources on whom respondents had relied in obtaining information to commence this suit. See App. 10, 22-43; and see I Hearings 213.

[7] In July 1971, Robert F. Froehlke was appointed Secretary of the Army.

the military, for dealing with multiple, large-scale, concurrent civil disturbances.[8]

It is in this context that one must view the Army's civil disturbance information collection plan, issued on May 2, 1968. The preamble to the collection plan makes the point quite well (I Hearings 383): "If the Army must be used to quell violence it wants to restore law and order as quickly as possible and return to its normal protective role—to do this it must know in advance as much as possible about the well-springs of violence and the heart and nerve causes of chaos." It was to this end that "spot reports" were prepared on public gatherings that portended possible civil disorder (see Exhibit A to the Complaint; App. 13-16). This intelligence information was then stored by the Army in a special civil disturbance computer data bank located at Fort Holabird, Maryland (App. 52, 55, 69).[9] And, as described in our main brief (p. 8), the names of those individuals and organizations contained in the "spot reports" were placed in a separate "identification list" (App. 54, 71; and see n. 11 in our main brief). Referring again to the preamble of the collection plan (I Hearings 383):

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[8] Even during this period, however, only "a small proportion of the total time and effort of personnel assigned to investigative and counterintelligence organizations was used for collection or processing of civil disturbance information. The great majority of investigative personnel were at all times engaged in the routine [military] personnel background investigations" (I Hearings 382).

[9] And see nn. 15 and 16 of our main brief (pp. 10-11).

> In obtaining the information called for in this plan the Army seeks only to collect that needed to exercise honest and sound judgment of the measures to be taken in suppressing rampant violence and restoring order—to assure that only the mildest effective measures are exercised—to insure that no overstepping of the degree of force or circumscription needed is applied—to conserve military resources and to avoid infringement on the responsibility and authority of civil government agencies—to insure pervasive vigilance for the fundamental rights of private citizens by the selective and enlightened use of force in restraint against those who are truly violating the rights of their fellow citizens.

b. Then Assistant Secretary Froehlke acknowledged in the congressional hearings that, during the height of civil disorders, "some people charged with responsibility in this field, especially at the local level, got a little bit too zealous in their activity" (I Hearings 430). "From the vantage point of hindsight," he stated, "the guidance and direction to the military for collection of civil disturbance information was too often general and oral rather than in written form" (I Hearings 430). But, "in December of 1968 the Army authorities began to become aware of how much information they were collecting" (I Hearings 427), and, with civil disorders subsiding in intensity, they started to reexamine their policy. Following issuance of a memorandum on February 5, 1969, by the Under Secretary of the Army, expressing concern over the scope of the Army's domestic intelligence system,

"a detailed review was made on many aspects of the civil disturbance related activities of the U.S. Army Intelligence Command" (I Hearings 393). It culminated in the following corrective measures (I Hearings 394):

> * * * the civil disturbance and biographic data bank at Fort Holabird was ordered destroyed on February 19, 1970, by the Army Assistant Chief of Staff for Intelligence. Just prior to that time, the U.S. Army Intelligence Command was directed to take a number of specific actions with reference to civil disturbance information. These included the destruction of personality lists, the discontinuance of spot reports to the Department of the Army, except those which indicated situations likely to require use of Army troops, the discontinuance of the daily civil disturbance summary to the Department of the Army, and the discontinuance of input of civil disturbance information into computer programs.

As pointed out in our main brief (pp. 10-11), these orders have now been carried out. The data bank at Fort Holabird, as well as two smaller civil disturbance computer data banks that had been established at Fort Hood, Texas, and Fort Monroe, Virginia, have been destroyed, with but a single print-out of each computer being retained for purposes of the present litigation. In addition, all copies of personality or identification lists that are known to exist, except the copies retained in connection with this suit, have been

destroyed.[10] But this is not the extent of the Army's disengagement from the type of intelligence activity here in question. We have shown in our main brief (pp. 9-11) that, by a directive issued June 9, 1970 (Pet. Br. App. B, pp. 45-51), the Army restricted its domestic intelligence operations in this area essentially to situations involving "a distinct threat of civil disturbance exceeding the law enforcement capabilities of local and state authorities * * *" (Pet. Br. App. B, p. 47). Department of Defense Directive 5200.27, issued March 1, 1971,[11] goes even farther. No longer may the Army engage in intelligence activity relating to civil disorder without "specific prior authorization of the Secretary of Defense or his designee [the Secretary of the Army]" (II Hearings 1254). Moreover, all information acquired in connection with an authorized surveillance, "regardless of when acquired, shall be destroyed within 90 days unless its retention is required by law or * * * is specifically authorized under criteria established by

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[10] While the Army cannot give definite assurance that all copies of these lists have been destroyed (see I Hearings 394), as best as can be determined the destruction is now complete. There may be, however, one or two copies of the identification lists that were circulated to local offices and, for one reason or another, not retained in the appropriate office file. If such was the case, the list might not have been destroyed as ordered. Because incomplete records were maintained with respect to the distribution of the lists, there is no way for the Army to verify that all copies have been destroyed. But, no known copies remain in existence.

[11] See II Hearings 1253-1255. And see II Hearings 1239, 1245-1246.

the Secretary of Defense or his designee" (II Hearings 1255).[12]

c. In short, as both the record in this case and the legislative hearings make abundantly clear, to whatever extent the Army had, as respondents allege in their complaint (App. 11), established a civil disturbance intelligence collection program, that program has been abolished.[13] Moreover, intelligence information gathered during the course of the Army's civil disturbance operations has either to the fullest extent possible been destroyed, or, as noted in our main brief (p. 8, n. 11) with respect to the U.S. Army Investigative Records Repository, is now being destroyed.

4. Perhaps because respondents speculate that this undisputed Army policy of disengagement from its prior civil disturbance intelligence activity may not

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[12] The relevant criteria are set forth at II Hearings 1245-1246.

[13] Much of the testimony at the legislative hearings concentrated on Army domestic intelligence operations between 1967 and June 1970, when the military directed (see Pet. Br. App. B, pp. 45-51) that civil disturbance surveillance be sharply curtailed. See generally I Hearings 100-101, 188-206, 262, 296, 308, 310, 324. As Mr. Pyle testified (I Hearings 156), "I am confident that since February 1970 there has been a substantial effort to cut this program back." And see I Hearings 206. The same point was made by Senator Ervin, Chairman of the Subcommittee on Constitutional Rights, in colloquy with then Assistant Secretary Froehlke (I Hearings 430): "I am frankly not looking for a culprit but I want to make it certain that these things don't happen in the future, and I would have to say I think you all have taken some very significant steps looking to that same means and I certainly commend you for it."

have been fully implemented—a conjecture without support in this record or in the legislative hearings—the case cannot be considered technically moot at this stage of the litigation. But there still remains a question of equity jurisdiction. When parties come before the courts seeking equitable relief by way of an injunction, they "must satisfy the court that relief is needed" (*United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633). Accordingly, the fact that the challenged activity has abated is relevant to the determination whether the suit remains one appropriate for equitable relief. It is not the usual practice of courts of equity to enjoin conduct which has already been terminated, when there is no real threat that it will be resumed. Compare *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, No. 70-61, this Term, decided January 10, 1972. In the absence of "some cognizable danger of recurrent violation; something more than the mere possibility which serves to keep the case alive" (*United States* v. *W. T. Grant Co.*, *supra*, 345 U.S. at 633); the dismissal of an action for extraordinary injunctive relief is well within the discretionary power of the courts. And this is especially so when the complaint fails to speak in terms of a clearly defined controversy between parties asserting specific, identifiable and conflicting interests capable of adjudication in an adversary context (see *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 90-91).

We have already pointed out (Pet. Br. 27-35) that the Constitution confines the exercise of judicial power to "Cases" and "Controversies." As stated in our main brief (p. 23), "Federal courts have not been given a roving commission to inquire generally into activities of the two other Branches of the Government." If, as respondents have alleged, the Army, in performing its civil disturbance intelligence function during the outbreak of widespread civil disorders in the late 1960's, exceeded the authority granted to it by Congress to carry out its civil disturbance mission—but see our main brief at pp. 30-33—that is a matter with which the Legislative Branch is particularly well suited to deal. It is in that forum, rather than in the courts, where, under the "separation of powers" prescribed by the Constitution, generalized grievances of the sort involved here are to be aired by the public. Resolution of such "broad questions of both law and policy" is, in the words of the dissent below, "much better undertaken, at this juncture, by the Congress * * *." And, in the absence of a clearly defined controversy presented by persons who assert a specific, identifiable, and distinct injury to themselves, there is no need for the federal courts, further removed from the "impact of actuality" (App. 154 n. 5), to duplicate that effort. Compare *Baker* v. *Carr*, 369 U.S. 186, 217.

5. Moreover, as developed in our main brief (pp. 35-42), respondents lack standing to request adjudication of the constitutional issues raised. Their as-

sertion that the question of standing is not properly before this Court is not well taken.

In petitioners' motion to dismiss in the district court (App. 73), it was argued "that there exists no justiciable issue, case or controversy and no basis for the granting of equitable, declaratory or other relief * * *". Of course, as this Court stated in *Flast* v. *Cohen*, 392 U.S. 83, 98, "[s]tanding is an aspect of justiciability." The district court specifically recognized this in its dismissal order, ruling that respondents "show no threats to their rights and present no justiciable controversy" (App. 128).

The standing question was raised again in the court of appeals. There, we noted in our brief (C.A. Br. p. 20 n. 20) respondents' assertion that they "are not people, obviously, who are cowed and chilled * * *," and suggested that they, "therefore, have no standing to complain," citing *Baker* v. *Carr*, 369 U.S. 186, 204, and *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241. The court of appeals divided on the merits of that contention (compare App. 140 n. 17 with App. 148-149); however, neither the majority nor the dissent below indicated that the question of standing had not been presented to the court.

In this Court, we once more challenged respondents' standing to maintain this suit in our petition for a writ of certiorari (pp. 8-12).[14] There is thus no basis to the claim that the question of standing is not now properly before this Court. As for respond-

[14] Respondents' opposition to the petition (pp. 24-30) argued the standing question only on its merits.

ents' other arguments on this point, they are fully answered in our main brief (pp. 35-42), and we see no need to repeat them here.[15]

## CONCLUSION

For the reasons stated here and in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and respondents' complaint should be dismissed.

ERWIN N. GRISWOLD,
*Solicitor General.*

ROBERT C. MARDIAN,
*Assistant Attorney General.*

ROBERT L. KEUCH,
GEORGE W. CALHOUN,
*Attorneys.*

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[15] We note that respondents seek to add a new dimension to their standing argument based on a claim of abridgment of associational rights "because the implementation of the Army's policy has inhibited others interested in their political cause from associating with them" (Resp. Br. 84). But the complaint in this case does not allege Army intelligence activity directed against any particular group or organization. This is not a suit like *NAACP* v. *Alabama*, 357 U.S. 449, for example, where an organization is suing on behalf of its members; the First Amendment claim of injury to "associational ties," as such, is not involved here. Rather, respondents come into court, as pointed out in our main brief (pp. 36-37), as self-appointed "private attorneys general" acting on behalf of "millions of Americans" who allegedly are inhibited from "associating" with others—not necessarily respondents—at public gatherings because of the alleged existence of Army civil disturbance intelligence operations. But, respondents readily assert that they "are not people, obviously, who are cowed and chilled * * *" (App. 148). Accordingly, they are without standing to maintain this suit.

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